Supreme Court, U.S.
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No. 99-1953

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, *et al.*,

Petitioners,

v.

TRI COUNTY INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Tri County Industries, Inc. ("Tri County") has no parent corporations and no publicly held company owns 10% or more of Tri County's stock.

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STATEMENT OF THE CASE

I. The Facts.

The District of Columbia begins its Petition by referring to the storage of contaminated soil by Tri County at the soil remediation facility prior to the issuance of a certificate of occupancy and the resulting notice of infraction and stop work order that were issued by government officials. It then indicates that Tri County's building permit was automatically suspended when the company failed to appear on October 13, 1993, at the Office of Adjudication for a hearing on the notice of infraction.

Omitted from this factual summary was any reference to the testimony of the District's own witnesses that both the stop work order and the suspension by the Office of Adjudication could have been removed at any time without difficulty by Tri County. Juan Berrayarza, an inspector for the District of Columbia, testified that the stop work order would have been lifted as soon as Tri County paid the underlying ticket and either removed the soil from the warehouse or obtained a certificate of occupancy. (SSA600-SSA601).[1] Phillip Thomas, a building inspector for the District, testified to the same facts . (SSA602) Lenox Simon, a defense witness from the Office of Adjudication, stated that once the fine was paid, the automatic suspension that resulted from the October 13, 1993 hearing would have been lifted. (SSA605-SSA606)

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1. References to the record below are as follows: "A" (Appendix filed in the D.C. Circuit); "SA" (Supplemental Appendix filed in the D.C. Circuit); "SSA" (Second Supplemental Appendix filed in the D.C. Circuit); and "T" (Trial Transcript).

Glenn Selzer, the president of Tri County, testified, without objection, that Tri County could at any time have removed the contaminated soil or obtained a provisional certificate of occupancy. (A69-A70) He also stated that Tri County had the ability to pay the relatively minor fine that had been imposed. (A69) Selzer testified that the major difficulty was Cross' earlier unconstitutional suspension of September 20, 1993, and that, until this suspension was lifted, the resolution of both the stop work order and the suspension for non-payment of the fine were not significant issues. (A70-A71)

As a result, the effect of the notice of infraction, stop work order and the Office of Adjudication decision became a jury question. The District argued, based upon *Carey v. Piphus*, 435 U.S. 247 (1978), that these administrative actions mooted the effect of Cross' unconstitutional suspension of September 20, 1993. Tri County contended that they were only a minor impediment, correctable at Tri County's discretion whenever Cross' suspension was lifted. The jury, in the first trial, accepted Tri County's position. A "jury's resolution of a factual dispute will stand if it is reasonably supported by the evidence." *Barbour v. Browner*, 181 F.3d 1342, 1344-45 (D.C. Cir. 1999).

The District of Columbia further refers to a letter dated October 15, 1993, from DCRA to Tri County seeking additional information regarding the project. (A394) It neglects to mention that the District reviewed this project for eight months before the building permit was issued on February 26, 1993, and that such review was extensive, including visits to the site. (Sweeney testimony, SSA613-SSA616) Sweeney, who had previously participated in the review of this project for the District, admitted that the

information requested in the October 15, 1993 letter would normally have been considered by DCRA during its review of the building application. (SSA616) Sweeney never asked anyone in DCRA if they already had this information before sending this letter to Tri County. (SSA616) Selzer stated that this information had previously been provided. (A291-A294) There was also no legal basis authorizing the District to request the information sought by this letter after the building permit had been issued. *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 457 (D.C. Cir. 1997) and A181-182. The District Court properly excluded this letter during the first trial. (A188)

The District Court also excluded from evidence a letter from DCRA to Tri County dated December 6, 1993 (A396), which purported to withdraw DCRA's environmental approval of this project. (A306-A310) Tri County had objected to the admission of this letter since the failure to respond to the October 15, 1993 correspondence was identified as one of the reasons for such withdrawal. In addition, the letter prejudicially refers to "significant adverse environmental impacts on nearby homes", which was a conclusion not supported by evidence introduced during the first trial.

The District of Columbia refers to alleged misrepresentations regarding the proximity of the Tri County facility to nearby residences. However, the District admitted in its answer that it had conducted an extensive review of Tri County's application for this facility including visits to the site. (SSA613) Based on such visits, the District acknowledged that it was aware of the location of these residences before it issued the building permit to Tri County. (SSA613) There was no basis for concluding that the District of Columbia was deceived when it issued the building permit to Tri County.

Lastly, the District of Columbia complains that the District Court struck all testimony regarding the health and safety dangers of this project when it concluded that such issues had been considered and resolved during the permitting process. This testimony was potentially very prejudicial to Tri County. There was also the testimony of the District of Columbia employees that, after an admittedly extensive review, this project would not imminently and substantially affect the public health, safety and welfare. (Sweeney, 4/16/98, T.435) The District of Columbia had further determined that there would be no significant environmental impact from this project when it granted approval to proceed without an environmental impact statement. (A390) Sweeney additionally stated that if the contaminated soil was kept inside the building, as was intended by Tri County, it would have no adverse effect on the surrounding homes. (SSA615) This testimony of a proper governmental review of the project warranted the exclusion of health and safety concerns from the trial under Rule 403 of the Federal Rules of Evidence, especially in view of the District of Columbia's failure to identify any legal means of closing the project after the permit had been issued. (A186-A187) The Court did not allow the jury to hear the testimony of Alfred Siess since he merely disagreed with the District of Columbia's decision to issue a permit for a soil remediation facility (A182-185) and his testimony would have only frightened the jury.

In its Memorandum Order granting a new trial, the District Court did not base its decision on the existence of other administrative suspensions, the proximity of residential homes, or the exclusion of all testimony relating to the health and safety of the project, including Siess and the October 15 and December 6, 1993 letters.

The District of Columbia's complaint that the record from the first trial was truncated is attributable solely to: (1) its own failure to call any witnesses on the issue of damages; and (2) its inability to establish a basis for termination of the project despite repeated requests from the District Court for such evidence.

Tri County also incorporates by reference all facts contained in the two opinions of the D.C. Circuit issued in these proceedings.

II. The D.C. Circuit's Decision.

The District of Columbia incorrectly argues that the D.C. Circuit applied a "more searching inquiry" standard to review the granting of a new trial. The standard of review used by the D.C. Circuit was abuse of discretion. (Pet., App. at 5, 7 and 10) While a more searching inquiry of the record may have been conducted by the D.C. Circuit to protect Tri County's constitutional right to a jury trial, the type of review does not affect the abuse of discretion standard that was employed.

The errors that the D.C. Circuit found in its review of the District Court's decision to grant a new trial were primarily legal in nature. It concluded that the trial court's imposition of an absolute duty on Tri County to mitigate its damages by pursuing an administrative appeal was erroneous. Numerous cases were cited by the D.C. Circuit in support of its conclusion. The failure to mitigate depended on "what action was reasonable under the circumstances," which was a jury question in view of Tri County's explanation for not initiating an administrative appeal. (Pet., App. at 6) The second legal error involved whether Tri County's evidence

of lost profits was speculative. The District Court overlooked and failed to apply the correct standard for proving such damages that was set forth in *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227 (D.C. Cir. 1997), when it granted a new trial. The District Court also ignored the controlling case of *Langevine v. District of Columbia*, 106 F.3d 1018 (D.C. Cir. 1997), when it stated that the amount of damages awarded by the jury shocked its conscience. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swift*, 456 U.S. 273, 287, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982). These errors cannot be said to involve mixed questions of law and fact since the applicable rule of law was never applied.[2] See *Pullman-Standard*, 456 U.S. at 289 n.19, 102 S. Ct. at 1790 n.19. Lastly, the District Court made a clearly erroneous factual finding when it stated in its Memorandum Order that it prevented the District of Columbia from presenting evidence that the Tri County facility would never have opened. Such actions by the trial court are not evident in the record. (Pet., App. at 10) It was the District of Columbia's failure to produce such evidence that resulted in the jury not considering this issue.

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2. In some circumstances, deferential review may be accorded to mixed questions of law and fact. *See Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S. Ct. 1217, 1222, 113 L. Ed. 2d 190 (1991).

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT OF COLUMBIA HAS WAIVED THE ISSUE ASSERTED IN ITS PETITION.

FRAP 28(a)(9)(B) requires the appellant to include in its brief that is submitted to the D.C. Circuit "a concise statement of the applicable standard of review" for each issue. If it is dissatisfied with the appellant's statement, the appellee should set forth its own statement of the standard of review. *See* FRAP 28(b).

With respect to the first trial, Tri County argued that the applicable standard of review was abuse of discretion. (Appellant's brief at 30, 31, 36, 44 and 45) Citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988), Tri County specifically indicated that the lower court's decision to grant a new trial was to be given "close scrutiny" to protect its right to a jury trial. (Appellant's brief at 30)

The District of Columbia never challenged in its brief whether such close scrutiny was appropriate or permissible. The District of Columbia's brief did not refer to *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996). The District of Columbia did not object to this "more searching inquiry" during oral argument. (Pet. at 22)

The District of Columbia first asserted its argument that a more searching inquiry by the appellate court was impermissible in its Petition for Rehearing and, in the

Alternative, for Rehearing *en banc*.[3] In a one sentence *per curiam* order, the D.C. Circuit denied the Petition on March 8, 2000. (Pet., App. at 16-17) The basis for this summary denial of the District's argument was undoubtedly its waiver of this issue since it had not been raised earlier. *See Grant v. U.S. Air Force*, 197 F.3d 539, 542 n.6 (D.C. Cir. 1999) (argument first made in a reply brief comes too late) and *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). This position is consistent with other Circuits that have considered the same issue. *See United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10th Cir. 1999) (defendant not allowed to introduce new issues in a petition for rehearing); *Anderson v. Branen*, 27 F.3d 29, 30 (2nd Cir. 1994) (refusal to consider new issue raised in a petition for rehearing); *Escobar Ruiz v. I.N.S.*, 813 F.2d 283, 285-286 (9th Cir. 1987) (extraordinary circumstances required to consider for the first time on rehearing issues not raised in briefs); *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979) (absent exceptional circumstances, new matters raised for the first time in a petition for rehearing will not be considered).

Issues presented in a petition for certiorari must have been considered by the appellate court or else the petition will be dismissed. *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3, 96 S. Ct. 2099, 2101 n.3, 48 L. Ed. 2d 660 (1976); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973). Since the appropriateness of close scrutiny of the record was not timely raised by the District of

3. In its Petition for a Writ of Certiorari, the District of Columbia incorrectly suggests that it proposed a different standard for review in its brief. (Pet. at 11) The District of Columbia merely stated in its Appellees' brief that it "agrees that the errors assigned by Tri County are subject to review under an abuse-of-discretion standard." (Appellees' brief at 22)

Columbia and not considered by the Court of Appeals, this issue has been waived and the Petition for Writ of Certiorari must be dismissed.

II.

THE D.C. CIRCUIT'S REVERSAL OF A DISTRICT COURT ORDER GRANTING A NEW TRIAL DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GASPERINI.*

The District of Columbia's reliance upon the *Gasperini* decision to support its Petition for Writ of Certiorari is misplaced. *Gasperini* holds that an appellate court can review a trial court's denial of a motion for new trial based on an alleged excessive jury verdict and that such review must be under an abuse of discretion standard. Prior to *Gasperini*, the Supreme Court had never held that federal appellate courts had such authority. 518 U.S. at 434. *Gasperini* does not hold, as the District contends, that the Seventh Amendment permits the district courts to exercise substantial discretion in granting new trials in all situations. It is limited to situations involving excessive jury verdicts. Two of the appellate decisions cited by the Supreme Court, *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969) and *Dagnello v. Long Island R. Co.*, 289 F.2d 797 (2d Cir. 1961), involved allegedly excessive jury verdicts. In the context of jury awards that are either excessive or against the weight of the evidence, a trial court's decision on a motion for a new trial does receive some deference by the appellate courts since it primarily involves consideration of the facts presented. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400, 110 S. Ct. 2447, 2458, 110 L. Ed. 2d 359 (1990) (district court's findings of fact reviewed under a deferential

standard). Such issues involving excessive verdicts generally arise only in personal injury actions when elements of damage such as pain and suffering cannot be quantified.

The District Court did not have such discretionary factual issues before it in this case when it granted a new trial. It simply applied the wrong law to the evidence. Deferential review is not accorded when legal issues are involved. *See Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392 (1996) (a court of appeals need not defer to the district court's resolution of a question of law); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 115 S. Ct. 1920, 1926, 131 L. Ed. 2d 985 (1995) (questions of law decided *de novo*). Certainly, the District Court attempted to make its Memorandum Opinion read as if the case involved the question of an excessive verdict. It mentions that the "jury's award of some $4.5 million in assertedly lost profits was in any event grossly excessive and shocks the judicial conscience." (Pet., App. at 13) However, as the D.C. Circuit indicated, the evidence at trial established damages in excess of $12 million. (Pet., App. at 9) A verdict of less than half of this amount was within the range of the evidence and cannot be treated as excessive by the court. *See Langevine, supra*. The trial court committed legal error when it ignored this rule of law that was to be applied. Such legal error allows the trial court's finding to be set aside. *Pullman-Standard*, 456 U.S. at 287.

The District of Columbia attempts to undercut the controlling law set forth in *Langevine* by labeling it a "rule of thumb".[4] (Pet. at 19) However, it was binding precedent

4. *Langevine* states that "a jury's determination of damages may only be disturbed if it 'is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.' " 106 F.3d at 1024 (*quoting Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 96 (D.C. Cir. 1987)).

on the District Court which was entirely disregarded. Tri County cited and relied on *Langevine* in its brief that was filed with the D.C. Circuit. (Appellant's brief at 44) The District never mentioned *Langevine* in its brief and, to the extent that it now questions the validity of such opinion, has clearly waived this argument.

Gasperini is also not applicable for a second reason. It further states that "courts of appeals engage in review of district court excessiveness determinations, applying 'abuse of discretion' as their standard." 518 U.S. at 492 (citing *Grunenthal*, 393 U.S at 159). To the extent that an appellate court applies a stricter or more lenient standard of review than abuse of discretion, then it may be reversed. *See General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) and *First Options of Chicago, Inc. v. Kaplan, supra.*

At the same time, however,

> a decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from *thorough* appellate review." *Albemarle Paper Co.*, 422 U.S., at 416, 95 S.Ct., at 2371. Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise.

United States v. Taylor, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419, 101 L. Ed. 2d 297 (1988) (Emphasis supplied) "Independent appellate review necessarily entails a *careful consideration* of the district court's legal analysis. . . ." *Salve Regina College*, 499 U.S. at 232, 111 S. Ct. at 1221. (Emphasis supplied)

Abuse of discretion occurs when a court makes a factual finding that is clearly erroneous. *Cooter & Gell*, 496 U.S. at 386, 110 S. Ct. at 2450. It also occurs when it makes an error of law or when the court's discretion was guided by erroneous legal conclusions. *Koon*, 518 U.S. at 100, 116 S. Ct. at 2047-48.

The D.C. Circuit's opinion indicates that it reviewed the District Court's granting of a new trial under an abuse of discretion standard. There is no suggestion in the opinion that this standard was applied strictly or "more exactingly". The fact that the D.C. Circuit reviewed the record with close scrutiny does not enlarge or restrict the abuse of discretion standard.[5] It merely reflects thorough appellate review and careful consideration of the district court's legal analysis that are referred to in *United States v. Taylor, supra*, and *Salve Regina College v. Russell, supra*. A more searching inquiry of the record is not prohibited by *Gasperini*.

The District of Columbia relies upon an excerpt from the oral argument before the D.C. Circuit to support its contention that the abuse of discretion standard was applied too strictly. (Pet. at 22) This portion of the transcript merely refers to the standard to be applied by the trial court when it considers setting aside a jury verdict and granting a new trial. The D.C. Circuit did not discuss during oral argument the standard to be applied by an appeal court when it reviews such decisions. Further, any review of the actions of the D.C.

5. In *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156, 159, 89 S. Ct. 331, 333, 21 L. Ed. 2d 309 (1968), the Court expressed no difficulty with the court of appeals making "a *detailed appraisal of the evidence* bearing on damages" in order to determine if the trial court abused its discretion in denying a new trial motion. (Emphasis supplied).

Circuit must be based on its final opinion rather than statements made during oral argument. The D.C. Circuit's opinion indicates application of the abuse of discretion standard with no suggestion that it was applied "more exactingly".

III.

NO CONFLICT EXISTS AMONG THE CIRCUITS THAT WOULD JUSTIFY THE GRANTING OF THE DISTRICT OF COLUMBIA'S PETITION FOR CERTIORARI.

Contrary to the District of Columbia's position, there is no intolerable conflict among the Circuits over the standard of appellate review of new trial orders. The District of Columbia primarily relies upon *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) to establish a circuit split. Prior to *Medcom*, the Seventh Circuit applied a more exacting standard of review when the district court granted a new trial on damages. *See Superbird Farms, Inc. v. Perdue Farms, Inc.*, 970 F.2d 238, 247 (7th Cir. 1992); *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989); and *Matter of Innovative Construction Systems, Inc.*, 793 F.2d 875, 888 (7th Cir. 1986).

Medcom held, based upon *Gasperini*, that the abuse of discretion standard did not have to be applied "more exactingly". Instead, an ordinary abuse of discretion standard was to be applied. The D.C. Circuit utilized the same ordinary abuse of discretion standard in this case. *Medcom* does not even discuss if close scrutiny of the record is appropriate under an abuse of discretion standard of review.

The other decisions cited by the District of Columbia also do not reflect any disagreement or conflict with the approach taken by the D.C. Circuit. *Central Office Telephone, Inc. v. American Tel. & Tel. Co.*, 108 F.3d 981 (9th Cir. 1997), *rev'd on other grounds*, 524 U.S. 214 (1998), does not even address the issue of abuse of discretion. Both *Consorti v. Armstrong World Industries, Inc.*, 103 F.3d 2 (2d Cir. 1996), and *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1997), only state that appellate review of a denial of a motion to set aside the verdict as excessive is to an abuse of discretion standard. *Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987), was decided nine years before *Gasperini*. While it does label the approach contained in *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960) (*en banc*), *cert. denied*, 364 U.S. 835 (1960), as applying a stricter standard of review, this is an incorrect characterization. *Lind* only required a closer degree of scrutiny when a jury verdict is set aside as being against the weight of the evidence. It still applied an abuse of discretion standard to its review of the trial court's decision. *Lind*, 278 F.2d at 88.

Under these circumstances, no actual conflict exists among the different Circuit courts that would justify the granting of certiorari in this case.

IV.

THE D.C. CIRCUIT WAS CORRECT IN CONCLUDING THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN SETTING ASIDE THE ORIGINAL JURY VERDICT AND GRANTING A NEW TRIAL.

In an effort to establish that important and fundamental issues are involved in this case, the District of Columbia mischaracterizes the nature of the earlier proceedings. It attempts to portray the case as an encroachment by the D.C. Circuit on the District Court's ability to make discretionary decisions in the context of reviewing a jury trial. As the D.C. Circuit's opinion makes clear, the trial court committed significant legal errors when it granted a new trial. It should not have determined that Tri County was unreasonable as a matter of law in failing to file an administrative appeal after Tri County had introduced evidence explaining such lack of action. The District Court ignored the holding in *Samaritan Inns, Inc., supra*, when it concluded that Tri County's proof of damages was speculative. It further disregarded *Langevine* when it held that the jury verdict of $5 million shocked its conscience. Lastly, the District Court was clearly wrong in stating that it prevented the District of Columbia from proving that the Tri County facility would never have been allowed to open or operate. There is no indication in the record that such exclusionary rulings were ever made by the District Court.

As a result, the District Court unquestionably abused its discretion in the sense that it committed legal error and relied on clearly erroneous facts when it granted a new trial. Whatever discretion a trial judge should have in granting a new trial, it does not include legal error and reliance on non-

existent facts. The D.C. Circuit was entirely correct in its reversal of the lower court's granting of a new trial because the District Court did abuse its discretion.

A remand to the D.C. Circuit would serve no purpose since the errors committed by the District Court in this case did not involve discretionary decisions in which it might be accorded some degree of deference. Whether the D.C. Circuit closely scrutinizes the record or not, the result will be the same. The District Court clearly abused its discretion in granting a new trial and such decision should be reversed.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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